

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD L. ALLEN,

Defendant-Appellant.

UNPUBLISHED

July 24, 2003

No. 239670

Oakland Circuit Court

LC No. 01-176934-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of larceny in a building, MCL 750.360, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with larceny in a building on an aiding and abetting theory based on the theft of a wallet belonging to the proprietor of a clothing store. Complainant, the proprietor, testified that defendant entered the store and stated that he wished to purchase \$800 worth of clothing for his girlfriend. Subsequently complainant saw a person she identified as Charles Frazier crouching between clothing racks. Defendant told complainant that Frazier was with him. Frazier left the store. Complainant determined that her wallet was missing from her purse in the store office, and telephoned the police. As complainant spoke with the police, defendant left the store. The police observed a vehicle matching the description supplied by complainant, and saw defendant toss a wallet out the passenger window of the vehicle. Defendant had \$25.28 in cash but no credit cards on his person when he was arrested.

During closing argument defense counsel acknowledged that the evidence showed that Frazier took complainant's wallet from the store, but argued that the evidence did not show that defendant aided and abetted the crime, and asserted that defendant should not become a victim of guilt by association. During rebuttal closing argument the prosecutor contended that the evidence supported an inference that defendant entered the store on a pretext. The prosecutor noted that although defendant told complainant that he wanted to purchase \$800 worth of merchandise, he carried only \$25.28 in cash and no credit cards. The prosecutor also argued that it was reasonable to infer that defendant and Frazier worked together because the store had only one door for the public.

The jury found defendant guilty as charged. The trial court sentenced defendant as a habitual offender to one and one-half to fifteen years in prison, with credit for thirty-three days.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

The elements of larceny in a building are that: (1) the defendant took someone else's property; (2) the defendant took the property without consent; (3) the property was taken within the confines of a building; (4) there was some movement of the property; (5) the property was worth something at the time it was taken; and (6) at the time the property was taken, the defendant intended to deprive the owner of it permanently. MCL 750.360; see also *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). This offense is a specific intent crime. Intent can be inferred from the facts and circumstances surrounding the offense. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

To support a finding that a defendant aided and abetted a crime, the prosecution must show that: (1) the crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors which may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

Defendant argues that the trial court erred by failing to read CJI2d 8.5, the mere presence instruction, to the jury. We disagree. Defendant did not request that the trial court instruct the jury on mere presence; therefore, absent plain error, he is not entitled to relief. *Id.*, 763-764. The trial court instructed the jury that to convict defendant of larceny in a building on an aiding and abetting theory, it must find that defendant did something to assist in the commission of the crime, and that he intended that the crime be committed or that he knew that Frazier intended to commit the crime at the time he provided assistance. This instruction made it clear to the jury that it could not convict defendant based merely on a finding that defendant was present when Frazier committed the crime. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The instructions as a whole covered the substance of the omitted instruction and sufficiently protected defendant's rights. *Canales, supra*. Defendant has not demonstrated the existence of plain error, and is not entitled to relief. *Carines, supra*.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial

misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

In a supplemental brief, defendant argues that he was denied a fair trial by the prosecutor's improper arguments regarding the lack of credit cards found on his person at the time of his arrest and the number of doors in complainant's store.¹ We disagree. Defendant objected to the prosecutor's argument regarding the lack of credit cards on his person at the time of his arrest; however, the trial court overruled the objection. Defendant did not object to the argument regarding the number of doors in the store. The prosecutor's argument that defendant lacked the financial means to purchase \$800 worth of merchandise fairly pointed out that defendant's statement to complainant regarding his purpose for entering the store was false. The prosecutor's argument regarding the number of doors in the store was made to demonstrate that the store had only one door available for use by the public, and that under the circumstances it was reasonable to assume that defendant knew that Frazier was in the store. The prosecutor's argument constituted fair comment on the evidence, and did not deny defendant a fair trial. *Schutte, supra*. Defendant has not demonstrated the existence of plain error. *Carines, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens

¹ Defendant has attached copies of photographs depicting the front door and the rear door of the store. The record does not indicate that these photographs were admitted into evidence at trial. The photographs are not properly before this Court. MCR 7.210(A)(1).